

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 50 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

(No. 1 to 5 NO)

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SPECIAL RECOVERY OFFICER

Versus

MIRABEN NEMCHAND SHAH

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Appearance:

MR VIPUL S MODI for Petitioners

SERVED BY DS for Respondent No. 1

UNSERVED AS REFUSED for Respondent No. 2

MR. MA. BHUKHARI LD.GOV'T. PLEADER for Respondent No.3,4

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CORAM : MR.JUSTICE S.D.DAVE

Date of decision: 07/04/97

ORAL JUDGEMENT

The Appeal From Order is at the stage of the notice. It is hereby ordered to be admitted. It is accordingly admitted.

The facts are not much in dispute. One

Lalitkumar who happens to be the brother of Respondent No.2 Vinodkumar and the son of Respondent No.1 Smt. Miraben was in a transport business and he had taken certain advances from the Appellant No.2 Deesa Nagrik Sahakari Bank. It appears that he could not discharge his financial obligations and ultimately the award has been obtained against him. At the time of recovery, the objection has been taken that, Lalitkumar was not in a position to hypothecate the shares of Respondents No.1 & 2. The parties had gone before the Civil Forum by filing Special Civil Suit No. 127 of 1995 in the Court of Ld. Civil Judge (S.D.) Palanpur. In the said proceedings the necessary application under Order-39 Rule-1 & 2 came to be presented by Respondents No. 1 & 2. There case was that Lalitkumar could not have hypothecated the property in question and the defendant could not have taken the property for execution. The Court below has come to the conclusion that, of course Lalitkumar had a share in the property but so far the share has not been ascertained and therefore the recovery proceedings could not be started against Lalitkumar qua his undivided property. These orders are in challenge before me in the present Appeal.

Learned counsel Mr. Vipul Modi who appears on behalf of the appellants urges that, the Court below was at an apparent error in coming to the conclusion that till the share of Lalitkumar in the undivided property is not ascertained and separated, no recovery proceedings could be initiated. This contention has a considerable force. If the property was being owned by Respondent No.1 & 2 along with said Lalitkumar the Court could have said that the recovery proceedings could be initiated and completed qua the undivided share of Lalitkumar in the property. Because of this, it appears that the present Appeal requires to be allowed in part with some observations.

Accordingly the present Appeal is allowed. The orders under the appeal are hereby quashed and set aside. The matter is transmitted to the Court below with a view to decide the extent of the share of Lalitkumar in the undivided properties.

So far as the other question regarding the maintainability of the execution proceedings against the share of Lalitkumar is concerned, I would clarify the position by saying that, after the share of Lalitkumar is ascertained the recovery proceedings should go against his undivided share in the property.

The Court below shall decide and ascertain the extent of the undivided share of Lalitkumar in the properties within a period of four months from the date of receipt of the writ of the present orders.

This orders are being pronounced upon hearing learned counsel Mr. Vipul Modi for the Appellants. Respondent No.1 & 2 though served are not present and there has been no appearance on their behalf. Learned Govt. counsel Mr. Bhukhari has been has been heard for Respondents No.3 & 4.

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/venu